



THE UNIVERSITY *of* EDINBURGH

## Edinburgh Research Explorer

### New Hong Kong statute protects factual statements in medical apologies from use in litigation

**Citation for published version:**

Leung, G & Porter, G 2018, 'New Hong Kong statute protects factual statements in medical apologies from use in litigation', *Medico-Legal Journal*, pp. 1-4. <https://doi.org/10.1177/0025817218771803>

**Digital Object Identifier (DOI):**

[10.1177/0025817218771803](https://doi.org/10.1177/0025817218771803)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Medico-Legal Journal

**Publisher Rights Statement:**

The final version of this paper has been published in Medico-Legal Journal April 2018 by SAGE Publications Ltd, All rights reserved. © Leung & Porter, 2018. It is available at: <https://doi.org/10.1177/0025817218771803>

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



**Full title**

New Hong Kong statute protects factual statements from use in litigation in medical apologies

**Short title**

Apology law in Hong Kong

**Authors**

Gilberto K K Leung [1](#); Gerard Porter [2](#)

**Institutional affiliations**

- [1](#). Department of Surgery, The University of Hong Kong, Hong Kong.
- [2](#). School of Law, The University of Edinburgh, United Kingdom.

**Correspondence**

Professor Gilberto K.K. Leung, Tsang Wing-Hing Professor in Clinical Neuroscience, Department of Surgery, The University of Hong Kong, Queen Mary Hospital, 102 Pokfulam Road, Hong Kong; Email: gilberto@hku.hk; Tel: +852 22553368; Fax: +852 28184350.

**Funding**

This research received no specific grant from any funding agency in the public, commercial or not for-profit sectors.

**Declaration of interest**

The authors declared that there is no conflict of interest with respect to the research, authorship and/or publication of this article.

# New Hong Kong statute protects factual statements in medical apologies from use in litigation

Gilberto KK Leung, Gerard Porter

## Abstract

Providing an apology which contains a factual explanation following a medical adverse incident may facilitate an amicable settlement and improve patient experience. Numerous apology laws exist with the aim of encouraging an apology but the lack of explicit and specific protection for factual admissions included in “full” apologies can give rise to legal disputes and deter their use. The new Hong Kong Apology Ordinance expressly prohibits the admission of a statement of fact in an apology as evidence of fault in a wide range of applicable proceedings and thus provides the clearest and most comprehensive apology protection to date. This should significantly encourage open medical disclosure and the provision of an apology when things go wrong. This paper examines the significance and implication of the Apology Ordinance in the medico-legal context.

**Keywords:** apology law, apology ordinance, Hong Kong, liability, litigation, medico-legal, negligence, open disclosure

## Introduction

Apology laws around the world aim to encourage the giving of an apology for a failure by protecting an admission of fault or liability from being used as evidence in subsequent litigation but the protection offered varies. <sup>1</sup> Apology protection may promote open disclosure, improve patient satisfaction and facilitate settlement without recourse to litigation following a medical incident. <sup>2</sup> In some jurisdictions, the scope of protection may not be sufficiently clear or comprehensive to remove any doubt as to whether a particular part of an otherwise protected apology may still be used against the apologiser in medico-legal claims. <sup>3</sup> Of particular concern is the evidential admissibility of a factual statement that might indicate liability for fault, which is likely to deter people from offering “full apology”. However, blanket protection may conceivably interfere with a claimant’s right to justice in some circumstances so is of concern. This contentious issue has received relatively little attention which gives rise to legal disputes and some unpredictable judicial conclusions.

The Hong Kong Special Administrative Region of the People’s Republic of China is the first Asian jurisdiction to have introduced an apology law. <sup>4</sup> A distinctive feature of its Apology Ordinance (the “Ordinance”) is the explicit prohibition on the evidential admission of any statement of fact contained within an apology – a provision that is not expressly stated in other apology laws. <sup>3</sup> It offers the broadest protection to date for apologies made under a wide range of situations. This paper explores the significance and implication of this aspect of the Ordinance.

## Statement of fact in medical apologies

A medical apology may contain various components including, inter alia, an expression of remorse (e.g. "I am sorry"), an admission of fault (e.g. "I prescribed the wrong antibiotics") and a statement of fact (e.g. "The patient told me she was allergic to penicillin"). The inclusion of a factual account when apologising to the affected parties is considered good professional practice,<sup>5</sup> essential to the tendering of a proper "full apology", and, in England and Wales, a legal requirement under the statutory duty of candour.<sup>6</sup> By contrast, a "partial apology" devoid of any factual explanation is less conducive to amicable settlement and may indeed exacerbate dispute if it is considered insincere or evasive.<sup>2</sup> A widely cited disincentive against the inclusion of a factual admission in apologies, however, is the understandable, if not legitimate, concern about the legal consequences of such admissions of fault, especially when the statement is of high probative value and where apology laws do not protect such statements from use as evidence or where their admissibility is uncertain.

There are more than 50 examples of apology laws which give different levels of protection to factual statements. A detailed analysis is outwith the scope of this paper; readers are referred to the scholarly works by Kleefeld,<sup>3</sup> Wei<sup>7</sup> and Vines.<sup>8</sup> It suffices to say that, for present purposes, the term "apology" may or may not be clearly defined or encompass factual statements under existing laws; some may be silent on admissibility or may contain provisions that are drafted narrowly or subject to wide interpretative discretion.<sup>8</sup> Unsurprisingly, disputes and inconsistent judicial outcomes may result.

A case in point is found in Ohio, United States, where the Apology Statute does not distinguish between different components of an apology.<sup>9</sup> In *Davis v Wooster Orthopaedics & Sports Medicine, Inc.*, a patient died post-operatively and the surgeon included in his apology an admission of having injured an artery during surgery. The Ninth Appellate District exercised an interpretation of legislative intent and held that the Ohio statute was intended to protect only apologies devoid of any acknowledgement of fault, and therefore allowed the admission of the surgeon's statement in evidence.<sup>10</sup> This conflicted with a later decision in *Stewart v Vivian*, in which a patient committed suicide and her psychiatrist admitted prior knowledge of the patient's suicidal intent ("she wanted to kill herself").<sup>11</sup> A claim was brought against the doctor for failing to initiate proper monitoring. The Court of Appeal of the Twelfth District rejected the request by the patient's family to admit the psychiatrist's factual statement on the ground that the Ohio statute is in fact intended to "exclude all statements of apology". However, the Ohio Supreme Court affirmed the judgment in *Stewart* by concluding that the term "apology" should be applied in its plain and ordinary meaning and, by that token, its protection should cover "an acknowledgment that the patient's medical care fell below the standard of care".<sup>12</sup> Interestingly, the Supreme Court also held that the Ohio statute is unambiguous.

The need for clearer provisions or guidance on this aspect of apology protection is also demonstrated by non-medical cases. In the much-cited Australian case of *Dovuro Pty Limited v Wilkins*, the High Court of Appeal held that although the apology did not mean that the defendant was liable, the facts admitted in the apology could be severed and used to establish liability.<sup>3</sup> Note that apology laws vary between Australian states, and much would also depend on the court's view on severance.<sup>8</sup> In subsequent cases from New South Wales, for instance, the term "apology" was construed more broadly to render factual admissions inadmissible.<sup>13</sup>

A similar situation was found in Canada. Prior to the Hong Kong Ordinance, the Canadian legislation led the way in providing the broadest apology protection then extant. Section 2 (d) of the Uniform Apology Act, on which Canadian state laws are based, provides that an apology “may not be taken into account in any determination of fault or liability in connection with that matter”.<sup>14</sup> That, however, did not prevent factual statement from being parsed and treated separately from the rest of an apology. In the landmark case of *Robinson v Cragg* from Alberta involving mortgages and real estate refinancing, a letter of apology written by the defendant included an expression of regret, and an admission of fault as well as factual admissions relating to liability.<sup>15</sup> The Alberta legislation did not refer to factual admissions under its definition of apology,<sup>16</sup> and the court undertook a contextual analysis of the letter in *Robinson* and held that the factual admissions were not part of the apology and were therefore admissible.

The above cases illustrate that how an apology law is interpreted hinges heavily on its provisions on admissibility as well as on the definition of “apology” itself. It is against this backdrop that Hong Kong introduced its Ordinance with a view to clarifying the legal consequences of apology-making.<sup>17</sup>

### **The Apology Ordinance (Cap. 631)**

The Ordinance came into force on 1 December 2017 as the latest addition to this body of legislations. Its primary goal is to promote the wider use of mediation in resolving disputes; it does not directly impact mediation or mandate apologising. Its provisions apply to almost all civil (but not criminal) disputes subject to litigation and arbitration as well as disciplinary and regulatory proceedings (Clause 6). Under the Ordinance, an apology does not constitute an express or implied admission of fault or liability (Clause 7) nor will it void or affect insurance cover, compensation or other benefit (Clause 10). Unless the apology-maker wishes otherwise, an apology cannot be admitted as evidence for determining fault and liability (Clause 5).

What distinguishes the Ordinance from other apology statutes is its definition of apology, which is the broadest so far. It encompasses not only “an expression of regret, sympathy or benevolence” and “an admission of fault and liability”, but also any “statement of fact” (**Box 1**). By rendering an apology so defined as inadmissible as evidence, any embedded factual statement falls squarely under the Ordinance’s protection. It would be unnecessary to decide, and futile to argue, whether a factual admission forms part of an apology or is merely coupled to it. It will also become irrelevant to differentiate an admission of fault from an admission of fact contained within an apology – a challenging task that, as demonstrated in *Robinson*, can be subject to debate and imbued with uncertainties. In the medical context, a doctor in Hong Kong can therefore provide a factual explanation of an incident, orally or in writing, without fear of any disciplinary or legal repercussions arising from it.

#### **Box 1 - Definition and evidential admissibility of apology under the Apology Ordinance of Hong Kong (Cap. 631)**

##### Clause 4. Meaning of apology

- (1) An expression of the person’s regret, sympathy or benevolence.
- (2) The expression may be oral, written or by conduct, made by a person includes an apology made on behalf of the person.

(3) Includes an express or implied admission of the person's fault or liability in connection with the matter; or (b) a statement of fact in connection with the matter.

#### Clause 8. Admissibility of evidence of apology

(1) Evidence of an apology made by a person in connection with a matter is not admissible in applicable proceedings as evidence for determining fault, liability or any other issue in connection with the matter to the prejudice of the person.

(2) However, if in particular applicable proceedings there is an exceptional case (for example, where there is no other evidence available for determining an issue), the decision maker may exercise a discretion to admit a statement of fact contained in an apology as evidence in the proceedings, but only if the decision maker is satisfied that it is just and equitable to do so, having regard to the public interest or the interests of the administration of justice.

(3) This section applies despite anything to the contrary in any rule of law or other rule concerning procedural matters.

(4) In this section - decision maker, in relation to applicable proceedings, means the person (whether a court, a tribunal, an arbitrator or any other body or individual) having the authority to hear, receive and examine evidence in the proceedings.

This issue was not uncontroversial during the initial consultative process. A key objection was that the broad scope of protection may impose an additional evidential burden on the claimant and interfere with her right to justice.<sup>18</sup> As demonstrated in Stewart, a factual admission made soon after an adverse event can be of high evidential value. Although a claimant may, in theory, adduce evidence separately through other means, an apology that contains facts and a narrative can sometimes be the only source of evidence going to liability. This is particularly so when note taking has been unreliable, poor or non-existent which is not uncommon in negligence claims. Indeed, similar concerns were raised during the implementation of the apology law in Scotland;<sup>19</sup> amidst strong opposition, the proposal to include a statement of fact under the definition of apology was subsequently dropped.<sup>20</sup>

In response, the Steering Committee on Mediation in Hong Kong, which oversaw the implementation of the Ordinance, proposed various approaches that confer different degrees of judicial discretion in determining the admissibility of factual statements. The final version provides that a statement of fact may be admitted as evidence at the discretion of the decision-maker only in exceptional cases where it is "just and equitable" to do so, "having regard to the public interest or interests of administration of justice". An example (and the only example given in the Ordinance) of such an exceptional case is when there is no other evidence available for determining an issue (**Box 1**). The aim of this provision is, of course, to achieve a balance between unqualified judicial discretion and a blanket protection of factual admission under all circumstances.

How the Hong Kong court will exercise such discretion and apply the new law remains to be seen. For healthcare workers, residual risks may still be found in apologies containing factual information that is not documented elsewhere or which cannot otherwise be found and which is material to the standard of care and the causation of injury at issue. For example, a factual statement similar to that provided by the psychiatrist in Stewart, while being in part a "protectable" apology under the Ordinance, might conceivably be admissible as evidence in court. To the affected parties, reliable documentation of any tendered apologies may well serve to support subsequent claims. As for all

other apology laws, the Ordinance does not protect apologies in criminal prosecutions. This can mean that a factual statement, or indeed any statement, contained within an apology can be admissible as evidence in cases that involve, for example, fraud or gross negligence manslaughter charges. We will see how the Ordinance will work in practice.

## **Conclusion**

Judicial treatment of factual statements in apologies can be a ready source of contention and may impact on medical disclosure. The new Apology Ordinance in Hong Kong is a landmark reference for jurisdictions which aim to provide or strengthen apology protection in these situations and provides the least ambiguous, if not the most comprehensive, definition of a protected apology to date. Statements of fact are expressly protected from a wide range of civil proceedings and from having any effect on insurance benefit. This sharply contrasts with the situation in England and Wales, Hong Kong's past colonial master, where the Compensation Act 2006 is silent on the definition and admissibility of apologies.<sup>8</sup> Whether the Ordinance, or any other existing apology laws, will actually encourage apologies, reduce litigation, enhance doctor–patient relationships or lead to detrimental use of “tactical apologies” is uncertain and outcomes need to be monitored.<sup>21</sup>

## References

1. Heimreich JS. Does sorry incriminate – evidence, harm and the protection of apology. *Cornell J Law Public Policy* 2012;21(3):567-609.
2. Robbenolt JK. Apologies and medical error. *Clin Orthop Relat Res* 2009;467:376-82.
3. Kleefeld JC. Promoting and protecting apologetic discourse through law: a global survey and critique of apology legislation and case law. *Oñati Socio-Legal Series* 2017;7(3):455-96. Available from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3028811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028811) (accessed 29 December 2017).
4. Department of Justice, Apology Ordinance (Cap. 631). Available from: <https://www.elegislation.gov.hk/hk/cap631> (accessed 1 January 2018).
5. General Medical Council, Nursing and Midwifery Council. Openness and honesty when things go wrong: the professional duty of candour (June 2015). Available from: [www.gmc-uk.org/guidance/ethical\\_guidance/27233.asp](http://www.gmc-uk.org/guidance/ethical_guidance/27233.asp) (accessed 25 January 2018).
6. Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936), s. 20.
7. Wei M. Doctors, apologies, and the law: an analysis and critique of apology laws. *J Health Law* 2006;39(4). Available from: <https://ssrn.com/abstract=955668> (accessed 23 January 2018).
8. Vines P. Apologies and civil liability in England, Wales and Scotland: the view from elsewhere. *Edin Law Rev* 2008; 12(2):200-30.
9. Apology Statue R.C. 2317.43.
10. *Davis v Wooster Orthopaedics & Sports Medicine, Inc.*, 193 Ohio App.3d 581, 952 N.E.2d 1216 (9th Dist. 2011).
11. *Stewart v. Vivian*, 12th Dist. No. CA 2015-05- 039, 2016-Ohio-2892, 64 N.E.3d 606.
12. *Stewart v. Vivian*, Slip Opinion No. 2017-Ohio-7526.
13. *Wagstaff v Haslam* [2006] NSWSC 294, 2006 WL 1077099.
14. Uniform Apology Act (Uniform Law Conference of Canada, 2007)
15. *Robinson v Cragg*, 2010 ABQB 743 [Robinson].
16. Alberta Evidence Act, RSA 2000, c A-18, s 26.1.
17. Carroll R. When sorry is the hardest word to say. How might apology legislation assist. *Hong Kong LJ* 2014; 44:491-517.
18. Hong Kong Bar Association, Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation 22 April 2016). Available from: <http://www.hkba.org/sites/default/files/Bar%20Comments%20-%20Enactment%20of%20Apology%20Legislation%20in%20HK%20%28final%29.pdf> (accessed 21 January 2018).
19. Irvine C. The proposed Apologies Act for Scotland : good intentions with unforeseeable consequences. *Edin Law Review* 2013;17(1):84-90.
20. Apologies (Scotland) Act 2016, s. 3.
21. Dresser R. The limits of apology laws. *Hastings Cent Rep* 2008;38(3):6-7.